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Third report on subsequent agreements and subsequent practice in relation to the interpretation of treaties

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I. Introduction

1. In 2012, the Commission placed the topic 'Subsequent agreements and subsequent practice in relation to the interpretation of treaties' on its current programme of work.[1] This topic originated from previous work of the Commission's Study Group on Treaties over time.[2]

2. During its sixty-fifth session (2013), the Commission considered the first report on the topic "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and provisionally adopted five draft conclusions with commentaries.[3] These concerned:

- General rule and means of treaty interpretation (draft conclusion 1)
- Subsequent agreements and subsequent practice as authentic means of interpretation (draft conclusion 2)
- Interpretation of treaty terms as capable of evolving over time (draft conclusion 3)
- Definition of subsequent agreements and subsequent practice as means of treaty interpretation (draft conclusion 4)
- Attribution of subsequent practice (draft conclusion 5)

3. During the debate in the Sixth Committee on the report of the Commission on its sixty-fifth session, States generally reacted favourably to the work of the Commission on the topic.[4]

4. During its sixty-sixth session (2014), the Commission considered the second report on the topic and provisionally adopted five more draft conclusions with commentaries.[5] These concerned:

- Identification of subsequent agreements and subsequent practice (draft conclusion 6);
- Possible effects of subsequent agreements and subsequent practice in interpretation (draft conclusion 7);

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[1] *International Law Commission, Report of the Sixty-fourth session (2012), Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 10* (A/67/10), Chapter X, p. 121; General Assembly Resolution 67/92, paras. 2 and 3.

[2] *International Law Commission, Report of the Sixtieth session (2008), Official Records of the General Assembly, Sixty-third Session, Supplement No. 10* (A/63/10), Annex A , pp. 365-389; *International Law Commission, Report of the Sixty-first session (2009), Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), Chapter XII, pp. 353-355; *International Law Commission, Report of the Sixty-second session (2010), Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 10* (A/65/10), Chapter X, pp. 334-335; *International Law Commission, Report of the Sixty-third session (2011), Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter XI, pp. 279-284.

[3] *International Law Commission, Report of the Sixty-fifth session (2013), Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, p. 11.

[4] *Official Records of the General Assembly, Sixty-eighth Session, Report of the 18th and 19th meeting of the Sixth Committee* (A/C.6/68/SR.18; A/C.6/68/SR.19).

[5] *International Law Commission, Report of the Sixty-sixth session (2014), Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), Chapter VII, p. 168.

- Weight of subsequent agreements and subsequent practice as a means of interpretation (draft conclusion 8);

- Agreement of the parties regarding the interpretation of the treaty (draft conclusion 9);

- Decisions adopted within the framework of Conferences of States Parties (draft conclusion 10).

5. During the debate in the Sixth Committee in 2014, delegations generally welcomed the adoption of these five draft conclusions, which were considered balanced and in line with the overall objective of the work on the topic.[6]

6. At its 2014 session, the Commission requested, "by 31 January 2015", States and international organizations:

(a) to provide it with any examples where the practice of an international organization has contributed to the interpretation of a treaty; and

(b) to provide it with any examples where pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty."[7]

7. As of the date of submitting the present report, four contributions had been received.[8] Further contributions are welcome at any time.

8. The first two reports have considered general aspects of the topic. The present third report addresses the role of subsequent agreements and subsequent practice in relation to the interpretation of a particular type of treaty: constituent instruments of international organizations. While article 5 of the Vienna Convention on the Law of Treaties provides that the Convention is applicable to such treaties, it also recognizes that this may raise specific questions regarding their interpretation. An international organization, by definition, possesses a separate international legal personality and it exercises its powers (competences) and functions through its organs.[9] These characteristics raise certain questions, in particular regarding the relationship between subsequent agreements and subsequent practice of the parties to the constituent instruments themselves, and the subsequent conduct of the organs of international organizations, for the interpretation of constituent instruments of international organizations.

9. In addressing these questions, the important differences between States and international organizations should be borne in mind. The Commission has referred

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[6] *General Assembly, Report of the International Law Commission on the work of its Sixty-sixth session, Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-ninth session* (UN Doc A/CN.4/678), p. 8.

[7] *International Law Commission, Report of the Sixty-sixth session (2014), Official Records of the General Assembly, Sixty-ninth Session, Supplement No. 10* (A/69/10), Chapter III, p. 8.

[8] By Austria, Finland, Germany, and the European Union.

[9] See article 2 (a) and (c) of the Articles on the Responsibility of International Organizations:
(a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. ...;
(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization", *International Law Commission, Report of the Sixty-third session (2011), Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, p. 52.

to those differences in its general commentary to the 2011 articles on the responsibility of international organizations:

> International organizations are quite different from States, and in addition present great diversity among themselves. In contrast with States, they do not possess a general competence and have been established in order to exercise specific functions ("principle of speciality"). There are very significant differences among international organizations with regard to their powers and functions, size of membership, relations between the organization and its members, procedures for deliberation, structure and facilities, as well as the primary rules including treaty obligations by which they are bound.[10]

10. That statement describes not only the main differences between States and international organizations, but also characteristics of treaties that are constituent instruments of such organizations and may be relevant for their interpretation.

II. Scope of the present report

11. The present report does not address every aspect of the role of subsequent agreements and subsequent practice in relation to the interpretation of treaties involving international organizations.

12. The report is limited to the role of subsequent agreements and subsequent practice in relation to treaties which are the constituent instruments of international organizations (article 5 of the Vienna Convention on the Law of Treaties). It therefore does not concern the interpretation of treaties adopted within an international organization and those concluded by international organizations. The latter category is addressed by the Vienna Convention on the Law of Treaties between International Organizations and between States and International Organizations of 1986.[11] Whereas the interpretation of such treaties does, in principle, fall within the scope of the topic,[12] the Special Rapporteur is inclined to agree with Gardiner who has expressed the following view:

> It seems reasonable to predict that the rules on interpretation as replicated in the 1986 Convention will be subject to gravitational pull and will come to be regarded as stating customary international law in the same way as those of the 1969 Convention, but there is insufficient practice to assert this definitely.[13]

13. The report also does not address questions of the interpretation of decisions by organs of international organizations as such. As the International Court of Justice has held with respect to the interpretation of Security Council resolutions:

> While the rules on treaty interpretation embodied in articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation

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[10] Draft articles on the responsibility of international organizations, General commentary, para. 7 (*Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, p. 70, para. 88).

[11] A/CONF.129/15.

[12] This was clarified at the outset, see *supra* note 2, A/63/10, Annex A, p. 369 (at para. 12) and is reflected in the title of the topic which is general. http://usun.state.gov/briefing/statements/234013.htm

[13] R. Gardiner, *Treaty Interpretation* (Oxford, OUP, 2008), p. 111.

> of Security Council resolutions also require that other factors be taken into account. Security Council resolutions are issued by a single, collective body and are drafted through a very different process than that used for the conclusion of a treaty. Security Council resolutions are the product of a voting process as provided for in Article 27 of the Charter, and the final text of such resolutions represents the view of the Security Council as a body. Moreover, Security Council resolutions can be binding on all Member States (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 54, para. 116), irrespective of whether they played any part in their formulation. The interpretation of Security Council resolutions may require the Court to analyse statements by representatives of members of the Security Council made at the time of their adoption, other resolutions of the Security Council on the same issue, as well as the subsequent practice of relevant United Nations organs and of States affected by those given resolutions.[14]

14. These considerations are not only true for decisions of the Security Council, but also for many other decisions by organs of international organizations. Special considerations also apply to decisions by international courts, as has been confirmed by the International Court of Justice for its own judgments:

> A judgment of the Court cannot be equated to a treaty, an instrument which derives its binding force and content from the consent of the contracting States and the interpretation of which may be affected by the subsequent conduct of those States, as provided by the principle stated in article 31, paragraph 3 (b), of the 1969 Vienna Convention on the Law of Treaties. A judgment of the Court derives its binding force from the Statute of the Court and the interpretation of a judgment is a matter of ascertaining what the Court decided, not what the parties subsequently believed it had decided. The meaning and scope of a judgment of the Court cannot, therefore, be affected by conduct of the parties occurring after that judgment has been given.[15]

15. The present report does, however, consider the possible effect of decisions and conduct of organs of international organizations for the interpretation of a constituent instrument of an international organization.

16. The report does not address the question whether the conduct of different organs of international organizations may have different weight regarding the interpretation of constituent instruments of international organizations, including the question of the possible effect, for the purpose of interpretation, of pronouncements

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[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 442, para. 94; see also H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989, Part Eight", *British Yearbook of International Law*, vol. 67 (1996), p. 1, at p. 29; M. C. Wood, "The Interpretation of Security Council Resolutions", in J. A. Frowein and R. Wolfrum (eds.), *Max Planck Yearbook of United Nations Law*, vol. 2 (Leiden, Martinus Nijhoff Publishers, 1998), p. 73, at p. 85; Gardiner, *supra* note 13, p. 113.

[15] *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand, Judgment, I.C.J. Reports 2013*, p. 281, at p. 307, para. 75.

or other action by a treaty monitoring body consisting of independent experts;[16] these questions will be dealt with in the next report.

17. The report does not consider decisions by a court or a tribunal which is authorized by the constituent instrument of an international organization to adjudicate questions regarding the interpretation of such a treaty as a possible form of "subsequent practice" for the purpose of treaty interpretation.[17] Whereas they technically emanate from an organ of the international organization concerned and may under certain circumstances amount to a "clear and constant jurisprudence"[18] (or a "*jurisprudence constante*"), and thereby possessing considerable weight for the purpose of interpretation, such decisions by courts or tribunals constitute a special means for the interpretation of the treaty in subsequent cases, as indicated, in particular, by article 38 (1) (d) of the Statute of the International Court of Justice.

18. The present report is finally not concerned with decisions of Conferences of States Parties (COPs). In its draft conclusion 10, provisionally adopted in 2014, the Commission has addressed the possible effects of decisions adopted within the framework of Conferences of States Parties for the interpretation of treaties.[19] In this context, the Commission has observed that Conferences of States Parties "can be roughly divided into two basic categories", namely those conferences and assemblies of the parties to a treaty which "are actually an organ of an international organization within which States parties act in their capacity as members of that organ [...] [and those other COPs] convened pursuant to treaties that do not establish an international organization".[20]

III. Subsequent agreements and subsequent practice in the interpretation of constituent instruments of international organizations

19. The interpretation of treaties which are constituent instruments of international organizations, in accordance with article 5 of the Vienna Convention on the Law of Treaties (1), while being governed, in principle, by the rules expressed in articles 31-33 of the Vienna Convention on the Law of Treaties (2), knows specific modes of subsequent practice (3), as well as of subsequent agreements (4), which raise

[16] See *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Judgment, I.C.J. Reports 2010*, p.639, at pp. 663-664, para. 66; J. E. Alvarez, *International Organizations as Law-Makers* (Oxford, OUP, 2005), pp. 88-89; J. Klabbers, "Checks and Balances in the Law of International Organizations", *Ius Gentium*, vol. 1 (2007), p. 141, at pp. 151-152; G. Ulfstein, "Reflections in Institutional Design — Especially Treaty Bodies" in J. Klabbers and Å. Wallendahl (eds), *Research Handbook on the Law of International Organizations* (Cheltenham, Edward Elgar, 2011), p. 431, at p. 439.

[17] But see Gardiner, *supra* note 13, p. 111; O. Dörr, "Art. 31 General rule of interpretation", in O. Dörr and K. Schmalenbach (eds.), *The Vienna Convention on the Law of Treaties* (Berlin/Heidelberg, Springer, 2012), p. 521, at p. 531, para. 19.

[18] This is an expression from the context of the European Court of Human rights, see *Regina v. Secretary of State for the Environment, Transports and the Regions ex parte Alconbury (Developments Limited and others)* [2001] UKHL 231; *Regina v. Special Adjudicator ex parte Ullah; Do (FC) v. Immigration Appeal Tribunal* [2004] UKHL 26 [20] (Lord Bingham); *Regina (On The Application of Animal Defenders International) v. Secretary of State For Culture, Media and Sport* [2008] UKHL 15.

[19] A/69/10, p. 205.

[20] A/69/10, pp. 205-206.

questions of how to conceive them in terms of the Vienna rules of interpretation (5) and how to determine the character and the weight of such conduct (6). Finally, the question of the customary character of article 5 will be addressed (7).

1. Article 5 of the Vienna Convention on the Law of Treaties

20. Article 5 of the Vienna Convention on the Law of Treaties provides that:

> The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization.[21]

21. This provision follows the general approach of the Vienna Convention according to which its rules apply "unless the treaty otherwise provides".[22] When the Commission elaborated the *Draft Articles on the Law of Treaties* some members doubted whether a provision such as article 5 was necessary, since a constituent instrument of an international organization is unquestionably a treaty, and since the Vienna Convention is based on the understanding that the parties to a treaty may, with the exception of rules of *jus cogens*, agree on specific rules which can deviate from the rules of the Convention. For some time the Commission considered to formulate, instead of a general provision (as article 5), different specific provisions which would have constituted "reservations" regarding relevant rules of constituent instruments of international organizations in areas in which such treaties were likely to be treated differently by their parties (e.g. provisions regarding termination). Ultimately, however:

> ... the Commission concluded that the article in question should be transferred to its present place in the introduction and should be reformulated as a general reservation covering the draft articles as a whole. It considered that this would enable it to simplify the drafting of the articles containing specific reservations. It also considered that such general reservation was desirable in case the possible impact of rules of international organizations in any particular context of the law of treaties should have been inadvertently overlooked.[23]

22. Therefore, article 5 is not intended to add constituent instruments of international organizations to those treaties to which the Convention would normally apply, but rather to emphasize that the general rule according to which all treaties between States are subject to the rules of the Convention "unless the treaty otherwise provides" also applies to constituent instruments of international organizations.[24] Even if such constituent instruments may exhibit certain special characteristics, these can be taken into account by virtue of article 5, a provision which, by itself, does not constitute a special rule.

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[21] See also the parallel provision of article 5 of the Vienna Convention on the Law of Treaties between International Organizations and between States and International Organizations of 1986.

[22] See e.g. articles 16; 19 (a) and (b); 20 (1), (3), (4) and (5); 22; 24 (3); 25 (2); 44 (1); 55; 58 (2); 70 (1); 72 (1); 77 (1).

[23] *Yearbook of the International Law Commission, 1966*, vol. II, p. 191.

[24] K. Schmalenbach, "Art. 5 Treaties Constituting International Organizations and Treaties Adopted within an International Organization" in Dörr/Schmalenbach *supra* note 17, p. 89, at p. 89, para. 1.

23. A treaty which is a constituent instrument of an international organization may contain certain provisions which are unrelated to the powers (competences) and functions of the organization. For example, the United Nations Convention on the Law of the Sea is the constituent treaty of the International Seabed Authority, an "[international] organization through which States Parties shall, in accordance with this Part, organize and control activities in the Area" (article 157 of the Convention).[25] This suggests that the rules of the Convention which are unrelated to the responsibilities of the Authority are, from a functional point of view, not part of the constituent rules of this particular international organization, although they are formally part of one instrument. On the other hand, there are also instruments which may be separated from each other to a certain degree, but which are functionally closely interrelated. One example is the Agreement Establishing the World Trade Organization which serves as an umbrella for a number of other treaties which are formally annexed to it and whose implementation is supervised and enabled by the organization.[26] It is not necessary, for the purpose of the present report, to determine whether the term "constituent instrument of an international organization" in article 5 should be defined in purely formal or also in functional terms. Even if it were defined by taking functional considerations into account, the term "constituent instrument of an international organization" would encompass all provisions of a treaty, or of different formally connected treaties, for whose implementation, or supervision thereof, the organization is given certain responsibilities.

2. The application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations

24. Article 5 confirms the applicability, as a general rule, of the rules of the Vienna Convention, including articles 31 to 33 regarding treaty interpretation, to treaties which are constituent instruments of international organizations.[27] The International Court of Justice has confirmed this in its advisory opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* by stating that:

> From a formal standpoint, the constituent instruments of international organizations are multilateral treaties, to which the well-established rules of treaty interpretation apply.[28]

25. In the same vein, the Court has pronounced with respect to the Charter of the United Nations that: "On the previous occasions when the Court has had to interpret the Charter of the United Nations, it has followed the principles and rules applicable in general to the interpretation of treaties, since it has recognized that the Charter is a multilateral treaty, albeit a treaty having certain special characteristics."[29]

26. At the same time, article 5 suggests, and the case-law confirms, that constituent instruments of international organizations are also treaties of a particular type which may need to be interpreted in a specific way. Accordingly, the International Court of Justice has stated:

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[25] UNTS vol. 1833 I-31363.

[26] UNTS vol. 1867 I-31874.

[27] Gardiner, *supra* note 13, 247.

[28] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74, para. 19.

[29] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 157.

> But the constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation owing, inter alia, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, as well as its own practice, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.[30]

27. By virtue of article 5, more specific "relevant rules" of interpretation which are contained in a constituent instrument of an international organization take precedence over the general rules of interpretation under the Vienna Convention.[31] However, few such constituent instruments contain explicit rules regarding their interpretation.[32] Still, specific "relevant rules" of interpretation must not necessarily be formulated explicitly in the constituent instrument of an international organization, but may also be implied, or be part of the "established practice of the organization".[33]

28. For example, the Court of Justice of the European Union has developed its own practice of interpreting the Founding Treaties of the Union by emphasizing their object and purpose and their effective implementation.[34] This approach has been explained by the Court to be a consequence of its interpretation of the founding treaties of the European Union as creating a "new legal order" rather than

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[30] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19.

[31] See, for example, J. Klabbers, *An Introduction to International Institutional Law*, 2nd edition (Cambridge, CUP, 2009), p. 88; Schmalenbach, *supra* note 24, p. 89 para. 1 and p. 96 para. 15; C. Brölmann, "Specialized rules of Treaty Interpretation: International Organizations" in D. B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford, OUP, 2012), p. 522; Dörr, *supra* note 17, p. 538, para. 32.

[32] Most so-called interpretation clauses determine which organ is competent authoritatively to interpret the treaty, or certain of its provisions, but do not formulate rules "on" interpretation itself, see C. Fernández de Casadevante y Romani, *Sovereignty and Interpretation of International Norms* (Berlin/Heidelberg, Springer, 2007), pp. 26-27; Dörr, *supra* note 17, p. 537, para. 32.

[33] See Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations [VCLTIO], 21 March 1985, Art. 2 (j), UN Doc A/CONF.129/15, 25 ILM 543, 547 [VCLT-IO]; and the International Law Commission's (ILC) Draft Articles on the Responsibility of International Organizations [DARIO], 3 June 2011, Art. 2 (b), UN Doc A/66/10, 54, 54; C. Peters, "Subsequent practice and established practice of international organizations", *Göttingen Journal of International Law*, vol. 3 (2011), pp. 617-642.

[34] This approach can be traced back to the landmark decisions *Van Gend en Loos and Costa/ENEL* on the special character of the European Union legal order, see Case C-26/62 *Van Gend en Loos* [1963] ECR 1, and Case C-6/64 *Costa v ENEL* [1964] ECR 585. See also P. J. Kuijper, "The European Courts and the Law of Treaties: The Continuing Story", in E. Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* (Oxford, OUP, 2011), p. 256, at pp. 258 ff. It should be noted, however, that the Court has, at times, made reference to the Vienna rules on treaty interpretation, particularly to the object and purpose of the treaty and its provisions, when interpreting Founding Treaties of the Union, see Case C-268/99 *Aldona Malgorzata and others* [2011], para. 35 (with further references to previous decisions).

simply an ordinary international organization.[35] The Andean Tribunal of Justice has adopted a similar approach.[36] As a consequence of its general approach, the Court of Justice of the European Union does not take subsequent practice by the parties or the organs of the Union into account as far as it is competent to interpret the founding treaties of the European Union.[37] By pointing out that "a mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty [and that] such a practice cannot therefore create a precedent binding on Community institutions with regard to the correct legal basis",[38] the Court of Justice of the European Union not only refers to derogation in the sense of modification, but also to the taking into account of subsequent practice as a decisive element in the interpretation of rules of primary Union law.

29. At the same time, the Court of Justice of the European Union does not deny the applicability of the customary rules of interpretation, as they are expressed in the Vienna Convention, to be binding upon the European Union institutions and that they form part of the European Union legal order.[39] The Court therefore does take into account the subsequent practice when it comes to the interpretation of treaties concluded by the European Union with non-member States, or other international

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[35] *Opinion 2/13* (Full Court), 18 December 2014, on the compatibility of with EU law of the draft agreement for EU accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms, at http://curia.europa.eu/juris/document/document.jsf?text=&docid=160882&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=40247 (stating that "[…] the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only States but also their nationals", para. 157; this has been confirmed by the European Union (EU) in its contribution to the request of the ILC to provide it with examples where the practice of an international organization has contributed to the interpretation of a treaty (see A/69/10, p. 8) [hereinafter 'EU *Contribution*'] ("… that the Union law represents an autonomous legal order and that the founding Treaties of the Union are not like ordinary international treaties is a long standing and well-settled case-law, the origins of which could be traced back to judgments delivered already in the early years of existence of the European Communities."); Gardiner, *supra* note 13, pp. 113-114.

[36] K. Alter and L. Helfer, "Legal Integration in the Andes: Law-Making by the Andean Tribunal of Justice", *European Law Journal*, vol. 17 (2011),p. 701, at p. 715 ("The ATJ invoked ECJ jurisprudence to establish Andean Community law as distinct from traditional international law").

[37] Case C-43/75, *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455, paras. 14, 33 and 57; G Nolte, "Second Report for the ILC Study Group on Treaties over time", in *id.* (ed.), *Treaties and Subsequent Practice* (Oxford, OUP, 2013), p. 210, at pp. 297-300; see also *EU Contribution* ("subsequent practice of institutions of the Union in implementation of the founding Treaties is not capable of creating a precedent binding upon the Union's institutions with regard to the proper interpretation and implementation of the relevant provisions of the Treaties").

[38] Case C-68/86 *United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities* [1988] ECR 855, para. 24; see also Case C-327/91 *French Republic v. Commission of the European Communities* [1994] ECR I-3641, paras. 31 and 36.

[39] Case C-410/11, *Pedro Espada Sánchez et al. v. Iberia Lineas Aéreas de España SA* [2012], para. 21; Case C-613/12, *Helm Düngemittel GmbH v. Hauptzollamt Krefeld* [2014], para. 37; Case C-386/08, *Brita GmbH v Hauptzollamt Hamburg-Hafen* [2010] ECR I-1289, para. 42.

organizations.[40] According to the Court, such international instruments are "governed by international treaty law and, more specifically, as regards its interpretation, by the international law of treaties".[41]

3. Subsequent practice as a means for the interpretation of constituent instruments of international organizations

30. Since the rules of the Vienna Convention regarding treaty interpretation (articles 31-33) apply, in principle, to treaties which are constituent instruments of international organization, "without prejudice to any relevant rules of the organization", and given the fact that their "own practice" "may deserve special attention when the time comes to interpret" such treaties,[42] the question arises which forms of conduct may constitute relevant subsequent practice for the purpose of the interpretation of a constituent instrument of an international organization.

31. Three forms of conduct may be relevant:

(a) the subsequent practice of the parties to constituent instruments of international organizations under articles 31 (3) (b) and 32 of the Vienna Convention;

(b) the practice of organs of an international organization;

(c) a combination of practice of organs of the international organization of subsequent practice of the parties.

32. The International Court of Justice, like other judicial or quasi-judicial bodies and States, has recognized that all three forms of conduct may be relevant for the interpretation of constituent instruments of international organizations.

(a) Subsequent practice of the parties to constituent instruments of international organizations under articles 31 (3) (b) and 32 of the Vienna Convention

33. The Court has, in the first place, recognized that article 31 (3) (b) is applicable to constituent instruments of international organizations. In its Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, after describing constituent instruments of international organizations as being treaties of a particular type, the Court introduced its interpretation of the WHO Constitution by stating:

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[40] Case C-52/77, *Leonce Cayrol v Giovanni Rivoira & Figli* [1977] ECR 2661, at p. 2277. Case C-432/92, *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and others* [1994] ECR I-3087, at paras. 43 and 50-51; Nolte, *supra* note 37, pp. 300-302.; Finland, in its contribution, has pointed to the possibility that "EU-regulation (especially directives) could be seen as practice affecting the interpretation of international agreements."

[41] Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, [2010] ECR I-1289, para. 39. On this differentiated approach towards the interpretation of founding treaties and those treaties entered by the EU and other States, or international organizations, see Kuijper, *supra* note 34, pp. 258-260; and H. P. Aust, A. Rodiles and P. Staubach, "Unity or Uniformity: Domestic Courts and Treaty Interpretation", *Leiden Journal of International Law*, vol. 27 (2014), p. 75, at pp. 101-104.

[42] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para. 19.

> According to the customary rule of interpretation as expressed in Article 31 of the 1969 Vienna Convention on the Law of Treaties, the terms of a treaty must be interpreted "in their context and in the light of its object and purpose" and there shall be "taken into account, together with the context:
>
> ...
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."[43]

34. Referring to different precedents from its own case-law in which it had, inter alia, employed subsequent practice under article 31 (3) (b) as a means of interpretation, the Court announced that:

> It will also apply it in this case for the purpose of determining whether, according to the WHO Constitution, the question to which it has been asked to reply arises 'within the scope of [the] activities' of that Organization.[44]

35. Regarding the subsequent practice element of its interpretation of this term the Court remarked the following:

> Resolution WHA46.40 itself, adopted, not without opposition, as soon as the question of the legality of the use of nuclear weapons was raised at the WHO, could not be taken to express or to amount on its own to a practice establishing an agreement between the members of the Organization to interpret its Constitution as empowering it to address the question of the legality of the use of nuclear weapons.[45]

36. Thus, when considering whether a particular resolution of an organ expressed or amounted to "a practice establishing agreement between the members of the Organization" the Court emphasized, quoting article 31 (3) (b), the relevance of the agreement of the parties to the respective treaty themselves, and not the practice of the organ as such.[46]

37. *Land and Maritime Boundary between Cameroon and Nigeria* is another decision in which the Court put decisive emphasis, in a case involving the interpretation of a constituent instrument of an international organization,[47] on the subsequent practice of the parties themselves. Proceeding from the observation that

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[43] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 75, para 19.

[44] *Ibid.*

[45] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 81, para. 27.

[46] The Permanent Court of International Justice had adopted this approach in its *Case concerning the Competence of the International Labour Organization to regulate, incidentally, the personal Work of the Employer, Advisory Opinion, P.C.I.J. Rep Series B No. 13*, at pp. 19-20; see S. Engel, "'Living' International Constitutions and the World Court (the Subsequent Practice of International Organs under their Constituent Instruments)", *International and Comparative Law Quarterly*, vol. 16 (1967), p. 865, at p. 871.

[47] See Art. 17 Convention and Statute relating to the Development of the Chad Basin (Treaty of Fort-Lamy von 1964), *Heidelberg Journal of International Law*, vol. 34 (1974), at p. 76 (available at: http://www.zaoerv.de/34_1974/34_1974_1_a_52_82.pdf); generally: P. H. Sand, "Development of International Water Law in the Lake Chad Basin", *ibid.*, pp. 52-76.

"Member States have also entrusted to the Commission certain tasks that had not originally been provided for in the treaty texts",[48] the Court concluded that:

> From the treaty texts and the practice [of the parties] analysed at paragraphs 64 and 65 above, it emerges that the Lake Chad Basin Commission is an international organization exercising its powers within a specific geographical area; that it does not however have as its purpose the settlement at a regional level of matters relating to the maintenance of international peace and security and thus does not fall under Chapter VIII of the Charter.[49]

38. Apart from subsequent practice which establishes the agreement of the parties under article 31 (3) (b), other subsequent practice by parties in the application of the constituent instrument of an international organization may also be relevant for the interpretation of that treaty. Constituent instruments of international organizations, like other multilateral treaties, are, for example, sometimes implemented by subsequent bilateral or regional agreements or practice.[50] Such bilateral treaties are not, as such, subsequent agreements under article 31 (3) (a), if only for the fact that they are only concluded between a limited number of the parties to the multilateral constituent instrument. They may, however, imply assertions concerning the proper interpretation of the constituent instrument itself and, taken together, they may be relevant for the interpretation of such a treaty.

39. The 1944 Chicago Convention on International Civil Aviation, which establishes the International Civil Aviation Organization (ICAO),[51] provides an example for such a form of subsequent practice through bilateral agreements in a multilateral constituent treaty framework. The Chicago Convention leaves several aspects for the parties to settle on a bilateral, plurilateral or regional basis. In order to achieve as much uniformity as possible among the parties to the Convention, a "Form of Standard Agreement" was agreed and annexed to the Final Act of the 1944 Conference. This model agreement gives general guidance for the adoption of subsequent bilateral agreements regarding the performance of international commercial air services (air service agreements or air transport agreements).[52] The two air transport agreements between the United States of America and the United Kingdom of Great Britain and Northern Ireland of 1946 and 1977 (the so-called "Bermuda" and "Bermuda II" agreements)[53] have served as standards for other States, many of which have developed their own model agreements based on them.

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[48] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at p. 305, para. 65.

[49] *Ibid.*, at pp. 306-307, para. 67.

[50] E. Benvenisti and G. W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law", *Stanford Law Review*, vol. 60 (2007), p. 595, at pp. 610-611.

[51] Convention on International Civil Aviation (Chicago Convention) (adopted on 7 December 1944, entered into force on 4 April 1947) 15 UNTS 295.

[52] See H. A. Bowen, "The Chicago International Civil Aviation Conference", *The George Washington Law Review*, vol. 13 (1944-1945), p. 308, at pp. 309 ff.

[53] Replaced by the 2007 Open Skies Agreements between the US, the European Community and its Member States, as amended by the 2010 Protocol; see <http://www.state.gov/documents/organization/143930.pdf> accessed 12 March 2012. On the Bermuda Agreements and their influence on other bilateral agreements, see, P.P.C. Haanappel, "Bilateral Air Transport Agreements — 1913-1980", *The International Trade Law Journal*, vol. 5 (1980), pp. 241-267.

A third generation of bilateral agreements which have been concluded after 1990[54] follows a series of treaties between the United States and several other States which grant further liberalization and freedom rights than the previous agreements which they supersede ("Open Skies Agreements"). A few plurilateral and regional treaties perform the same function.[55]

40. Between 3,000 and 4,000 mostly bilateral air service agreements or air transport agreements have been entered into since the entry into force of the Chicago Convention, most of which are registered with ICAO. This bilateral system which is derived from the Chicago Convention has been described as a "complex web of interlocking ASA agreements",[56] which "evolved through subsequent State practice".[57]

41. A well-known case of subsequent practice by the parties to a constituent instrument by way of an accumulation of bilateral agreements concerns article 5 of the Chicago Convention. According to this provision, non-scheduled flights (mostly by charter airlines) "shall have the right to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing", provided they do not take or discharge passengers, cargo or mail. In practice, however, States parties have over the years required "charter airlines to seek permission to land in all cases, and the article is now so interpreted".[58] The practice of requiring authorization is partly unilateral, but it is also expressed in several bilateral air service agreements.[59] The combination of such unilateral requirements by some States parties to the Chicago Convention, a series of corresponding bilateral agreements among yet another set of parties, and the absence of opposition by other States parties may have established an agreement among the parties of the Chicago Convention regarding the interpretation of article 5 of the Chicago Convention. But even if such agreement cannot be established, the subsequent practice which has emerged from the series of bilateral agreements and

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[54] See P. Jomini, A. Chai, P. Achard and J. Rupp, "The changing landscape of Air Service Agreements" (30 June 2009) <http://gem.sciences-po.fr/content/publications/pdf/Jomini_evolution_of_ASAs_062009.pdf> accessed 12 March 2012.

[55] Such as the Multilateral Agreement on the Liberalization of International Air Transportation between Brunei Darussalam, Chile, New Zealand, Singapore and the United States of 2001, and the Protocol to this Agreement of the same date between Brunei Darussalam, New Zealand and SingaporeInformation on these multilateral agreements, as well as the text of the Agreements can be found at: <http://www.maliat.govt.nz/> accessed 12 March 2012; L. Tomas, "Air Transport Agreements, Regulation of Liability", in R. Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* <http://www.mpepil.com> accessed 12 March 2012.

[56] Department of Infrastructure and Transport of Australia, *The Bilateral System — how international air services work*: <http://www.infrastructure.gov.au/aviation/international/bilateral_system.aspx> accessed 12 March 2012.

[57] B. F. Havel, *Beyond Open Skies, A New Regime for International Aviation* (Alphen aan den Rijn, Kluwer Law International, 2009), p. 10.

[58] A. Aust, *Modern Treaty Law and Practice* 3rd edition, (Cambridge, CUP, 2013), p. 215; see also A. M. Feldman, "Evolving Treaty Obligations: A Proposal for Analyzing Subsequent Practice derived from WTO Dispute Settlement", *International Law and Politics*, vol. 41 (2009), p. 215, at p. 664.

[59] P.P.C. Haanappel, *The Law and Policy of Air Space and Outer Space, A Comparative Approach* (Alphen aan den Rijn, Kluwer Law International, 2003), pp. 110-111, referring to the practice of the US as reflected in open skies agreements.

unilateral conduct may be taken into account in the interpretation of article 5 of the Chicago Convention[60] under article 32 of the Vienna Convention.

42. Another example for the relevance, for the purpose of the interpretation of a constituent instrument of an international organization, of an agreement subsequently arrived at between less than all parties to that instrument is the Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea.[61]

(b) Practice of organs of an international organization

43. In other cases, the International Court of Justice has referred to the practice of organs of an international organization in its interpretative reasoning apparently without reference to the practice or to the acceptance of the members of the Organization. In particular, the Court has stated that the international organization's "own practice" "may deserve special attention" in the process of interpretation.[62] For example, in its advisory opinion on the *Competence of the General Assembly regarding Admission to the United Nations*, the Court stated that:

> The organs to which article 4 entrusts the judgment of the Organization in matters of admission have consistently interpreted the text in the sense that the General Assembly can decide to admit only on the basis of the recommendation of the Security Council.[63]

44. Similarly, in *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, the Court referred to acts of organs of the organization when it referred to the practice of "the United Nations":

> In practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials. ... In all these cases, the practice of the United Nations shows that the persons so appointed, and in particular the members of these committees and commissions, have been regarded as experts on missions within the meaning of Section 22.[64]

45. Also, in its IMCO advisory opinion, the International Court of Justice has referred to "the practice followed by the Organization itself in carrying out the Convention" as a means of interpretation.[65]

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[60] *Ibid.*

[61] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted on 28 July 1994, entry into force on 28 July 1996) 1836 UNTS 42; see D. Anderson, "Article 5 of the 1969 Vienna Convention" in O. Corten and P. Klein, *The Vienna Convention on the Law of Treaties* (Oxford, OUP, 2011), p. 88, at p. 95, para. 26.

[62] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion, I.C.J. Reports 1996*, p. 66, at p. 74.

[63] *Competence of the General Assembly regarding Admission to the United Nations, Advisory Opinion, I.C.J. Reports 1950*, p. 4, at p. 9.

[64] *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, I.C.J. Reports 1989*, p. 177, at p. 194, para. 48.

[65] *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 150, at p. 169.

46. In its advisory opinion on *Certain Expenses of the United Nations it was an important consideration for the Court that*

> It is a consistent practice of the General Assembly to include in the annual budget resolutions, provision for expenses relating to the maintenance of international peace and security. Annually, since 1947, the General Assembly has made anticipatory provision for 'unforeseen and extraordinary expenses' arising in relation to the 'maintenance of peace and security'.[66] '"The Court concludes that, from year to year, the expenses of UNEF have been treated by the General Assembly as expenses of the Organization within the meaning of Article 17, paragraph 2, of the Charter.'[67]

47. In that advisory opinion the Court also explained why the practice of organs, as such, may be relevant for the interpretation of the constituent instrument of an international organization:

> Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an advisory opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'.[68]

48. Since many international organizations share the same characteristic of not having an "ultimate authority to interpret" their constituent instrument, this reasoning of the Court has been generally accepted as reflecting a general principle of the law of international organizations.[69]

49. The identification of a presumption, in the *Certain Expenses* opinion, which arises from the practice of an organ of an international organization, is a way of recognizing such practice of organs as a means of interpretation. The practice of organs in the application of a constituent instrument can thus, at a minimum, be conceived as being "other subsequent practice" under article 32.[70] The effect which the Court has ascribed to the practice of organs seems, however, to go further than the conditions and effects contemplated in article 32. Since the presumption recognized in the *Certain Expenses* opinion already arises from one or more acts by the organ of an international organization, such practice is not necessarily identical with "established practice" according to article 2 (j) of the Vienna Convention on

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[66] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 160.

[67] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 175.

[68] *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962*, p. 151, at p. 168.

[69] Klabbers, *supra* note 31, p. 90; C.F. Amerasinghe, *Principles of the Institutional Law of International Organizations*, 2nd edition (Cambridge, CUP, 2005), p.25; J.E. Alvarez, *International Organizations as Law-Makers* (Oxford, OUP, 2006), p. 80; S. Rosenne, *Developments in the Law of Treaties 1945-1986* (Cambridge, CUP, 1989), pp. 224-225.

[70] See Draft Conclusions 1 (4) and 4 (3), *International Law Commission, Report of the Sixty-fifth session (2013), Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, p. 11.

the Law of Treaties between States and International Organizations or between International Organizations, which may even constitute a "rule of the organization".[71] This demonstrates that the practice of organs of international organizations may, in itself, constitute a means of interpretation for the constituent instrument of the organization, and that the presumptive effect according to the *Certain Expenses* opinion is merely an example for such a role in the process of interpretation.[72] By also referring to acts of international organizations which were adopted against the opposition of certain member states,[73] the Court has recognized that such acts may constitute subsequent practice for the purposes of interpretation, but not a (more weighty) practice that establishes agreement between the parties regarding the interpretation.

50. It should also be noted that the practice of the organ of one international organization may contribute to the interpretation of the constituent instrument of another international organization. For example, the secretariat of the International Maritime Organization has recently reaffirmed its long-standing position according to which:

> Non-compliance with these IMO provisions would result in sub-standard ships and violate the basic obligations set forth in UNCLOS concerning safety of navigation and prevention of pollution from ships.[74]

51. These examples demonstrate that the practice of organs, as such and independently of the acceptance by all the parties to the constituent instrument of the international organization concerned, has been recognized as a means of interpretation, although not as a measure which is necessarily determinative for the outcome of the process of interpretation. Commentators agree that the interpretation of the constituent instruments of international organizations by the practice of their

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[71] It should be noted that the Commission held, in its commentary to the draft articles, that the reference in article 2 j) to 'established practice' "is in no way intended to suggest that practice has the same standing in all organizations", *Yearbook of the International Law Commission, 1982*, vol. II, p. 21, para. 25.

[72] E. Lauterpacht, "The Development of the Law of International Organizations by the Decisions of International Tribunals", *Recueil de Cours*, vol. 152 (1976), p. 377, at p. 460; N. Blokker, "Beyond 'Dili': On the Powers and Practice of International Organizations", in G. Kreijen (ed), *State, Sovereignty, and International Governance* (Oxford, OUP, 2002), pp. 312-318.

[73] See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 (referring to GA Res. 1600 (XV), UN Doc. A/RES/1600 (Apr. 15, 1961) (adopted with 60 votes in favor, 23 abstentions, and 16 votes against, including the USSR and other States of the 'East bloc'); G.A. Res. 1913 (XVIII), U.N. Doc. A/RES/1913 (Dec. 13, 1963) (adopted by 91 affirmative votes over 2 negative votes of Spain and Portugal).

[74] Implications of the United Nations Convention on the Law of the Sea for the International Maritime Organization, LEG/MISC.8, 30 January 2014, p. 12; this information was provided by Germany in response to the request by the Commission for information; however, the International Court of Justice has held with respect to a treaty which was not the constituent instrument of an international organization: "It must be pointed out, first of all, that the existence of an administrative practice does not in itself constitute a decisive factor in ascertaining the views the Contracting States to the Genocide Convention may have had concerning the rights and duties resulting therefrom", *Reservations to the Conventions on Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 25.

organs often constitutes a relevant means of interpretation.[75] The interpretative effect of the practice of organs may therefore amount to the effect provided for in article 32 and, depending on the rules of the constituent instrument concerned, possibly beyond.

(c) Combination of practice of organs of the organization and subsequent practice of the parties

52. A third possibility to take practice in the application of a constituent instrument of an international organization into account is to consider a combination of the practice of organs of the organization and of the subsequent practice by the States parties of that organization, in particular their acceptance of the practice of organs.[76] Accordingly, in its *Namibia* advisory opinion, the International Court of Justice arrived at its interpretation of the term "concurring votes" in article 27 (3) of the Charter of the United Nations as including abstentions primarily by relying on the practice of the organ concerned in combination with the fact that it was then "generally accepted" by member States:

> [...] the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization.[77]

53. In this case, the Court equally emphasized the practice of one or more organs of the international organization and the "general acceptance" by the member States, and characterized the combination of those two elements as being a "general

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[75] C. Brölmann, "Specialized Rules of Treaty Interpretation: International Organizations" in D. Hollis, *The Oxford Guide to Treaties* (Oxford, OUP, 2012), pp. 520-521; S. Kadelbach, "The Interpretation of the Charter", in: B. Simma/D.-E. Khan/G. Nolte/A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, 3rd edition (Oxford, OUP, 2012), p. 71, at p. 80; Gardiner, *supra* note 13, pp. 113 and 246 (who also points to the fact that although international organizations have accumulated much experience in interpreting their own constituent instruments, much of the relevant material is either not very accessible or does not "readily yield up insights into application of rules of treaty interpretation").

[76] R. Higgins, "The Development of International Law by the Political Organs of the United Nations", *ASIL Proceedings 59th Annual Meeting* (1965), p. 116, at p. 119.

[77] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22.

practice of the organization".[78] The Court followed this approach in its advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* by stating that:

> The Court considers that the *accepted* [emphasis added] practice of the General Assembly, as it has evolved, is consistent with Article 12, paragraph 1, of the Charter.[79]

54. Similarly, in the *Whaling in the Antarctic* case, the International Court of Justice referred to (non-binding) recommendations of the International Whaling Commission (which is the name of an international organization established by the Convention for the Regulation of Whaling[80] and an organ thereof), clarifying that when such recommendations are "adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule".[81] In this context, the Court expressed the view that:

> [...] Australia and New Zealand overstate the legal significance of the recommendatory resolutions and Guidelines on which they rely. First, many IWC resolutions were adopted without the support of all States parties to the Convention and, in particular, without the concurrence of Japan. Thus, such instruments cannot be regarded as subsequent agreement to an interpretation of Article VIII, nor as subsequent practice establishing an agreement of the parties regarding the interpretation of the treaty within the meaning of subparagraphs (a) and (b), respectively, of paragraph (3) of article 31 of the Vienna Convention on the Law of Treaties."[82]

55. Another example concerns the admission of the United Arab Republic (Egypt and Syria) to ICAO. In this case the ICAO Council decided to accept the United Arab Republic, but added that its decision was without prejudice to the "right of the Assembly to determine for itself questions concerning the United Arab Republic in relation to the Organization". The following decision of the Council "remained unchallenged and was accepted by the Member States by tacit consent".[83] A similar practice was followed in the cases of succession in the International Monetary Fund

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[78] H. Thirlway, "The Law and Procedure of the International Court of Justice 1960-1989, Part Two", *British Year Book of International Law*, vol. 61(1990), p. 61, at 76-77 (mentioning that "[t]he Court's reference to the practice as being 'of' the Organization is presumably intended to refer, not to a practice followed by the Organization as an entity in its relations with other subjects of international law, but rather a practice followed, approved or respected throughout the Organization. Seen in this light, the practice is not so much a set of acts of abstention by the permanent members, with the intention of neither blocking the proposed resolution, nor going on record as endorsing it, as rather a recognition by the other members of the Security Council at the relevant moment, and indeed by all member States by tacit acceptance, of the validity of such resolutions.

[79] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149 f.

[80] S. Schiele, *Evolution of International Environmental Regimes: The Case of Climate Change* (Cambridge, CUP, 2014), pp. 37-38; A. Gillespie, *Whaling Diplomacy: Defining Issues in International Environmental Law* (Edward Elgar, 2005), p. 411.

[81] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), I.C.J. Judgment of 31 March 2014*, para. 46, at http://www.icj-cij.org/docket/files/148/18136.pdf.

[82] *Ibid.*, para. 83.

[83] K. G. Bühler, *State Succession and Membership in International Organizations* (Alphen aan den Rijn, Kluwer Law International, 2001), p. 295 (referring to Thomas Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse, Syracuse University Press, 1969), p. 32.

membership of the members of the former Czech and Slovak Federal Republic and the Socialist Federal Republic of Yugoslavia.[84]

56. Some authors consider it necessary to "draw a distinction between the conduct of the organization collectively and the conduct of the parties",[85] but this does not exclude the possibility of assessing both forms of subsequent practice in combination.[86]

4. Subsequent agreements under article 31 (3) (a) as a means of interpretation of constituent instruments of international organizations

57. The interpretation of treaties which are constituent instruments of international organizations may also be affected by subsequent agreements under article 31 (3) (a). It should be noted, however, that the possible significance of agreements between the parties must be evaluated, in the first place, under the provisions of the constituent instrument itself and of other rules of the organization. If, for example, the constituent instrument contains a clause according to which the interpretation of the instrument is subject to a special procedure, it is to be presumed that the parties, by reaching an agreement subsequently to the conclusion of the treaty, do not wish to circumvent such procedure. In addition, the rules of the organization and its established practice may exclude taking into account agreements between the parties regarding the interpretation of its constituent instruments, as is the case for the European Union in areas in which the Court of Justice of the European Union exercises jurisdiction.[87]

58. Two basic forms of subsequent agreements regarding the interpretation of constituent instruments of international organizations exist: self-standing agreements between the parties and agreements between the parties in the form of a decision of a plenary organ of an international organization.

(a) Self-standing subsequent agreements between the parties

59. Self-standing agreements between the parties regarding the interpretation of constituent instruments of international organizations are rare. When questions of interpretation arise with respect to such an instrument, the parties mostly act as members within the framework of the plenary organ. If there is a need to modify, to amend, or to supplement the treaty, the parties either use the amendment procedure which is provided for in the treaty, or they conclude a further treaty, usually a protocol (articles 39-41 of the Vienna Convention). It is, however, also possible that the parties act *as such* within a plenary organ of the respective organization. In the European Union, for example, the European Council (an organ which comprises the Heads of State or Government of the member States, together with the Council's own president and the President of the Commission), "decided" in 1995 that:

> (...) the name given to the European currency shall be euro. ... The specific name euro will be used instead of the generic term "ECU" used by the Treaty to refer to the European currency unit.

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[84] Bühler *ibid.*, p. 298.

[85] E. Lauterpacht, *supra* note 72, p. 457.

[86] See e.g. Appeals Chamber, *ICTY, Prosecutor v. Tadic, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction*, no. IT-94-1-AR72 (2 Oct. 1995), para. 30.

[87] Supra, note 37.

> The Governments of the fifteen Member States have achieved the common agreement that this decision is the agreed and definitive interpretation of the relevant Treaty provisions.[88]

60. It is sometimes difficult to determine whether "member States meeting within" a plenary organ of an international organization intend to act in their capacity of members of that organ, as they usually do, or whether they intend to act in their capacity as States parties to the constituent instrument of the organization.[89] The Court of Justice of the European Union, when confronted with this question, in the first place, proceeded from the wording of the act in question:

> It is clear from the wording of that provision that acts adopted by representatives of the Member States acting, not in their capacity as members of the Council, but as representatives of their governments, and thus collectively exercising the powers of the Member States, are not subject to judicial review by the Court. As the Advocate General stated in section 18 of his Opinion, it makes no difference in this respect whether such an act is called an 'act of the Member States meeting in the Council' or an 'act of the representatives of the Governments of the Member States meeting in the Council.[90]

61. Ultimately, however, the Court accorded decisive importance to the "content and all the circumstances in which [the decision] was adopted" in order to determine whether the decision was that of the organ or of the States parties themselves:

> Consequently, it is not enough that an act should be described as a 'decision of the Member States' for it to be excluded from review under Article 173 of the Treaty. In order for such an act to be excluded from review, it must still be determined whether, having regard to its content and all the circumstances in which it was adopted, the act in question is not in reality a decision of the Council.

62. It appears that these considerations are also pertinent when determining whether a particular act is regarding the interpretation of the constituent instrument of the organization concerned.

(b) Decisions of plenary organs as subsequent agreements between the parties

63. Decisions and recommendations of plenary organs of international organizations regarding the interpretation or the application of a treaty provision may also, under certain circumstances, reflect a subsequent agreement between the parties under article 31 (3) (a), provided that such acts represent an agreement of the parties themselves to the constituent instrument. Accordingly, the World Trade Organization (WTO) Appellate Body has stated in general terms:

> Based on the text of Article 31(3)(a) of the Vienna Convention, we consider that a decision adopted by Members may qualify as a 'subsequent agreement

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[88] See Conclusions of the Madrid European Council 1995 (Bulletin of the EU, 12 (1995), p. 10) at I. A. 1.; for a description of this decision as a subsequent agreement, see Aust, supra note 58, p. 213; G. Hafner, "Subsequent Agreements and Practice: Between Interpretation, Informal Modification and Formal Amendment", in Nolte, *supra* note 37, p. 105, at pp. 109-110.

[89] P.C.G. Kapteyn and P. VerLoren van Themaat, *Introduction to the Law of the European Communities*, 3rd edition (London, Kluwer Law International, 1998), pp. 340-343.

[90] Case C-181/91 and C-248/91, *Parliament v. Council and Commission*, para. 12.

between the parties' regarding the interpretation of a covered agreement or the application of its provisions if: (i) the decision is, in a temporal sense, adopted subsequent to the relevant covered agreement; and (ii) the terms and content of the decision express an *agreement* between Members on the *interpretation* or *application* of a provision of WTO law.[91]

64. Regarding the specific conditions under which a decision of a plenary organ may be considered to be a subsequent agreement within the meaning of article 31 (3) (a), the WTO Appellate Body held:

> "263. With regard to the first element, we note that the Doha Ministerial Decision was adopted by consensus on 14 November 2001 on the occasion of the Fourth Ministerial Conference of the WTO.
>
> "... With regard to the second element, the key question to be answered is whether paragraph 5.2 of the Doha Ministerial Decision expresses an *agreement* between Members on the *interpretation* or *application* of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.
>
> "264. We recall that paragraph 5.2 of the Doha Ministerial Decision provides: Subject to the conditions specified in paragraph 12 of Article 2 of the Agreement on Technical Barriers to Trade, the phrase "reasonable interval" shall be understood to mean normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued.
>
> "265. In addressing the question of whether paragraph 5.2 of the Doha Ministerial Decision expresses an agreement between Members on the interpretation or application of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*, we find useful guidance in the Appellate Body reports in *EC — Bananas III (Article 21.5 — Ecuador II) / EC — Bananas III (Article 21.5 — US)*. The Appellate Body observed that the International Law Commission (the "ILC") describes a subsequent agreement within the meaning of Article 31(3)(a) of the *Vienna Convention* as "a further *authentic element of interpretation* to be taken into account together with the context". According to the Appellate Body, "by referring to 'authentic interpretation', the ILC reads Article 31(3)(a) as referring to *agreements bearing specifically upon the interpretation of the treaty*." Thus, we will consider whether paragraph 5.2 bears specifically upon the interpretation of Article 2.12 of the *TBT Agreement*.
>
> "266. Paragraph 5.2 of the Doha Ministerial Decision refers explicitly to the term "reasonable interval" in Article 2.12 of the *TBT Agreement* and defines this interval as "normally a period of not less than 6 months, except when this would be ineffective in fulfilling the legitimate objectives pursued" by a technical regulation. In the light of the terms and content of paragraph 5.2, we are unable to discern a function of paragraph 5.2 *other than* to interpret the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. We consider, therefore, that paragraph 5.2 *bears specifically* upon the interpretation of the term "reasonable interval" in Article 2.12 of the TBT Agreement. We turn now to consider whether paragraph 5.2 of the Doha Ministerial Decision reflects an "agreement" among Members—within the meaning of Article 31(3)(a) of the

[91] *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, Report of the AB-2012-1, WT/DS406/AB/R (4 April 2012), para. 262.

Vienna Convention—on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*.

"267. We note that the text of Article 31(3)(a) of the *Vienna Convention* does not establish a requirement as to the form which a "subsequent agreement between the parties" should take. We consider, therefore, that the term "agreement" in Article 31(3)(a) of the *Vienna Convention* refers, fundamentally, to substance rather than to form. Thus, in our view, paragraph 5.2 of the Doha Ministerial Decision can be characterized as a "subsequent agreement" within the meaning of Article 31(3)(a) of the *Vienna Convention* provided that it clearly expresses a common understanding, and an acceptance of that understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*. In determining whether this is so, we find the terms and content of paragraph 5.2 to be dispositive. In this connection, we note that the understanding among Members with regard to the meaning of the term "reasonable interval" in Article 2.12 of the *TBT Agreement* is expressed by terms — "*shall be understood to mean*" — that cannot be considered as merely hortatory.

"268. For the foregoing reasons, we uphold the Panel's finding ... that paragraph 5.2 of the Doha Ministerial Decision constitutes a subsequent agreement between the parties, within the meaning of Article 31(3)(a) of the *Vienna Convention*, on the interpretation of the term "reasonable interval" in Article 2.12 of the *TBT Agreement*."[92]

65. Although the Doha Ministerial Decision does not concern a provision of the WTO Agreement itself, it concerns an annex to that Agreement (the "TBT Agreement") and thus a provision of a constituent instrument of an international organization. In any case, the Appellate Body speaks of "WTO law" generally which includes, first and foremost, the WTO Agreement itself.

66. The reasoning of the Appellate Body is significant as it requires, for the decision of a plenary organ to constitute a subsequent agreement under article 31 (3) (a), that it "bears specifically upon the interpretation of the treaty", and that it should do so clearly ("we are unable to discern a function of paragraph 5.2 other than to interpret the term "reasonable interval"") in order to exclude the possibility that the parties merely intended the decision to provide one or more non-exclusive practical options for implementing the treaty, or a policy recommendation ("merely hortatory"). These rather strict conditions suggest that the Appellate Body generally considers that the decision of the WTO Ministerial Conference as a plenary organ, in addition to its regular effect under the constituent instrument, would only under exceptional circumstances possess the character of a subsequent agreement under article 31 (3) (a).

67. This view is in line with the view that acts of plenary organs of other international organizations may also, under certain circumstances, constitute subsequent agreements within the meaning of article 31 (3) (a). While authors have

[92] *Ibid.* (footnotes omitted).

made this point explicitly, both for the United Nations General Assembly[93] and for other plenary organs of international organizations,[94] the International Court of Justice has taken resolutions of the General Assembly into account when interpreting provisions of the Charter of the United Nations. Although the Court did not mention article 31 (3) (a), it made it clear that the mere adoption of a resolution would not be sufficient. This has in particular been the case when the Court relied on the General Assembly Declaration on Friendly Relations between States for the interpretation of Article 2 (4) of the Charter, emphasizing the "attitude of the Parties and the attitude of States towards certain General Assembly resolutions" and their

[93] See Aust, *supra* note 58, p. 213 (mentioning that UNGA Res 51/210 ('Measures to eliminate international terrorism') can be seen as a subsequent agreement about the interpretation of the UN Charter); E. Jiménez de Aréchega, "International Law in the Past Third of a Century", *Recueil des Cours*, vol. 159 (1978), p. 32 (stating in relation to the Friendly Relations Declaration that "[t]his Resolution does not purport to amend the Charter, but to clarify the basic legal principles contained in Article 2. Adopted in these terms and without a dissenting vote, it constitutes an authoritative expression of the views held by the totality of the parties to the Charter as to these basic principles and certain corollaries resulting from them. In the light of these circumstances, it seems difficult to deny the legal weight and authority of the Declaration both as a resolution recognising what the Members themselves believe constitute existing rules of customary law and as an interpretation of the Charter by the subsequent agreement and the subsequent practice of all its members"); Oscar Schachter, "General Course in Public International Law" *Recueil de Cours*, vol. 178 (1982), p. 113 ("The law-declaring resolutions that construed and 'concretized' the principles of the Charter - whether as general rules or in regard to particular cases - may be regarded as authentic interpretation by the parties of their existing treaty obligations. To that extent they were interpretation, and agreed by all Member States, they fitted comfortably into an established source of law. A prominent example cited by governments and lawyers is the Declaration of Principles of International Law concerning Friendly Relations adopted by consensus (i.e. without objection) in 1970"); N. D. White, *The United Nations System: Toward International Justice* (London, Lynne Rienner, 2002), p. 38 (noting that UN General Assembly resolutions adopted by consensus may be regarded as subsequent agreements); see also A. Boyle and C. Chinkin, *The Making of International Law* (Oxford, OUP, 2007), pp. 216-217 (observing in relation with Art. 31 (3) (a) VCLT that "[t]here are well-known instances of General Assembly resolutions interpreting and applying the UN Charter, including the Universal Declaration of Human Rights, the Declaration of Principles of International Law Concerning Friendly Relations, and others dealing with decolonization, terrorism or the use of force); P. Kunig, "United Nations Charter, Interpretation of" in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, *vol. X* (Oxford, OUP, 2012), p. 273, at 275 (stating that, "[i]f passed by consensus, they [i.e. GA resolutions] are able to play a major role in the formation and change of legal values and thereby in the interpretation of the UN Charter", and finding support for this in the *Nicaragua* judgment of the ICJ (Merits).

[94] H.G. Schermers and N. M. Blokker, *International Institutional Law*, 5th edition (Leiden/Boston, Martinus Nijhoff, 2011), p. 854 (referring to interpretations by the Assembly of the Oil Pollution Compensation Fund regarding the constituent instruments of the Fund); M. Cogen, "Membership, Associate Membership and Pre-Accession Arrangements of CERN, ESO, ESA, and EUMETSAT", *International Organizations Law Review*, vol. 9 (2012), p. 145, at 157-158 (referring to a unanimously adopted decision of the CERN Council of 17 June 2010 interpreting the admission criteria established in the CERN Convention as a possible case of a subsequent agreement under article 31 (3) (a)).

consent thereto.[95] Indeed, as the WTO Appellate Body has indicated, the characterization of a collective decision as an "authentic element of interpretation" under article 31 (3) (a) is only justified if it is clear that the parties of the constituent instrument of an international organization acted as such, and not, as they usually do, institutionally as members of the respective plenary organ.[96]

5. How to conceive various uses of subsequent practice and subsequent agreements in terms of the Vienna rules of interpretation

68. Different views have been expressed as to whether the various uses by international courts and tribunals of practice in the application of constituent instruments of international organizations as a means of interpretation merely represent different manifestations of articles 31 and 32 as the basic rules regarding the interpretation of treaties, or whether such uses also reflect a special or additional rule of interpretation which is applicable to such constituent instruments.

69. According to Gardiner, since the International Court of Justice followed the reference to the international organization's "own practice" in the *Nuclear Weapons in Armed Conflict* advisory opinion "by singling out the 1969 Vienna Convention's provision on subsequent practice for complete quotation in its brief reference to some elements of the general rule, it appears to have equated the organization's own practice with subsequent practice in the Vienna rules".[97] On the other hand, Schermers and Blokker, while recognizing that the Court, in this advisory opinion, has "more than before attempted to formulate a legal basis for referring to the

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[95] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 14, at p. 100, para. 188: "The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". This statement, whose primary purpose is to explain the possible role of General Assembly resolutions for the formation of customary law, also recognizes the (lesser) treaty-related point that such resolutions may serve to express the agreement, or the positions, of the parties regarding a certain interpretation of the UN Charter as a treaty ("elucidation"); similarly: *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 403, at p. 437, para. 80 (where the Court concluded from, inter alia, the Declaration on Friendly Relations between States: "Thus, the scope of the principle of territorial integrity is confined to the sphere of relations between States"); in this sense, for example, L. B. Sohn, "The UN System as Authoritative Interpreter of its Law" in O. Schachter and C. C. Joyner (eds.), *United Nations Legal Order*, vol.1 (Cambridge, ASIL/CUP, 1995); p. 169, at pp. 176-177 (noting in regard to the *Nicaragua* case that "[t]he Court accepted the Friendly Relations Declaration as an authentic interpretation of the Charter"); M. D. Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", *European Journal of International Law*, vol. 16 (2006), p. 879, at p. 897 (observing that according to the *Nicaragua* judgment the role of GA resolutions, such as the Friendly Relations Declaration, is not "confined to restatement or interpretation ('reiteration or elucidation').

[96] See *ibid.*, and Yves Bonzon, *Public Participation and Legitimacy in the WTO* (Cambridge, CUP, 2014), pp. 114-115 (arguing that "among decisions reached by WTO bodies, a distinction should be made between so-called 'institutional decisions' and 'non-institutional' decisions. The former — referred as 'subsidiary law-making' — are based on powers specifically attributed to a given organ and reached according to procedures established by the rules of the organization. By contrast, 'non-institutional' decisions are reached within the framework of the WTO, but by States individually as parties to a multilateral treaty on the basis of general international law — namely the 1969 Convention on the Law of Treaties").

[97] Gardiner, *supra* note 13, p. 247.

practice of the organization", considered that it is "a disadvantage of the approach taken by the Court that 'subsequent practice' as a canon of interpretation laid down in the 1969 Vienna Convention refers to the practice of the states that are party to a particular treaty, and not to the practice of the organization itself ...". In this sense, according to Schermers and Blokker, "article 31 (3) (b) of the Vienna Convention seems to be incorrect as a foundation on which the 'practice of the organization' may rest".[98]

70. The views of Gardiner and Schermers and Blokker do not seem to differ in substance, but rather in whether they regard an international organization's "own practice" as being relevant under article 31 (3) (b) (and 32) or rather on an independent basis. Others have attempted to bridge this constructive difference. For example, in the case of *The Lawfulness of the Recall of the Privately Held Shares*, the Arbitral Tribunal has held that:

> [Article 31 (3) (b)] takes on a special meaning when applied, in accordance with Article 5 of the Vienna Convention, to the constituent instruments of international organizations. In *Reparations for Injuries Suffered in the Service of the United Nations*, the International Court of Justice held that "the rights and duties of an entity such as the [United Nations] Organization must depend upon its purposes and functions as specified or implied in its constituent documents and developed in practice." The fact that the Bank has, on a number of occasions, amended its Statutes by the introduction of a new article appears to be probative of the authoritative interpretation of the Statutes in this regard.[99]

71. Klabbers, on the other hand, referring to the advisory opinion of the International Court of Justice in the *IMCO* case, questions the existence of "a special rule regarding the interpretation of constitutional treaties, which is not to deny that often, a more teleologically inspired interpretation takes place when it concerns constituent instruments."[100]

72. Whereas a certain difference persists between the approach of the Arbitral Tribunal and that of Klabbers, both seem to agree that an international organization's "own practice" will often play a specific role in the interpretation of their constituent instruments under the pertinent rules of the Vienna Convention, in particular by contributing to specifying the object and purpose of the treaty, or the functions of the organization.[101] As the Special Rapporteur has indicated in his first report, "subsequent agreements and subsequent practice, on the one hand, and the object and purpose of a treaty, on the other, can be closely interrelated" in the sense that that subsequent agreements and subsequent practice are "sometimes used for

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[98] Schermers/Blokker, *supra* note 94, p. 844; J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition (Oxford, OUP 2012), p. 187.

[99] *Partial Award on the Lawfulness of the Recall of the Privately Held Shares on 8 January 2001 and the Applicable Standards for Valuation of those Shares*, 22. November 2002, UNRIAA, vol. XXIII, p. 183, at p. 224, para. 145.

[100] Klabbers, *supra* note 31, pp. 89-90.

[101] The International Court of Justice used the expression "purposes and functions as specified or implied in its constituent documents and developed in practice", *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Rep. 1949*, p. 174, at p. 180.

specifying the object and purpose of the treaty in the first place."[102] The Commission subsequently confirmed, in its commentary to draft conclusion 1, that "given instances of subsequent practice and subsequent agreements contributed, or not, to the determination of the ordinary meaning of the terms in their context and in the light of the object and purpose of the treaty".[103]

73. The different explanations of the possible relevance of an international organization's "own practice" ultimately remain within the framework of the rules of interpretation reflected in the Vienna Convention on the Law of Treaties. Those rules permit to take into account not only the practice of an organization which the parties themselves confirm by their own practice (under a narrow interpretation of article 31 (3) (b)), but also to consider such practice of organs as being relevant for the proper determination of the object and purpose of the treaty (including the function of the international organization concerned), or as a form of "other practice" in the application of the treaty under article 32. Depending on the specific constituent instrument concerned, the organization's "own practice" may thus be considered to be relevant as such, or in combination with the practice of the parties, or as an indication of the object and purpose of the treaty, or not at all (as, for example, in the case of the European Union). In this sense, the modern case law reflects the approach described by Judge Lauterpacht in 1955 as follows:

> A proper interpretation of a constitutional instrument must take into account not only the formal letter of the original instrument, but also its operation in actual practice and in the light of the revealed tendencies in the life of the Organization.[104]

74. Article 5 allows for the application of the rules of interpretation in articles 31 and 32 in a way which takes account of the role which different forms of subsequent practice and subsequent agreements may play for the interpretation of a constituent instrument of an international organization, as well as for taking into account, as an aspect of the object and purpose of the treaty, the specific institutional character of the international organization or of the act concerned.[105] In their specific combination in each case, those elements contribute to identifying whether, and if so how, the interpretation of a constituent instrument of an international

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[102] *First Report on subsequent agreements and subsequent practice in relation to treaty interpretation* (A/CN.4/660), p. 21, para. 51 with further reference.

[103] *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV , p. 19, footnote 58; see in particular, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at pp. 306-307, para. 67.

[104] *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa, Advisory Opinion, Separate Opinion of Judge Lauterpacht, I.C.J. Reports 1955*, p. 67, at p. 106.

[105] Commentators are debating whether the specific institutional character of certain international organizations, in combination with the principles and values which are enshrined in their constituent instruments, could also yield a "constitutional" interpretation of such instruments which receives inspiration from national constitutional law, see e.g. J.E. Alvarez, "Constitutional Interpretation in International Organizations", in J.-M. Coicaud and V. Heiskanen (eds.), *The Legitimacy of International Organizations* (Tokyo, United Nations University Press, 2001), pp. 104-154; while such an approach has been recognized, in particular, for the founding treaties of the European Union, it has not been generally accepted for most other international organizations.

organization is capable of evolving over time.[106] Sometimes the taking into account of these elements has resulted in comparatively dynamic interpretations of such instruments.[107]

6. Character and weight of the practice of organs and of organizations

75. The previous work of the Commission is in line with this comprehensive approach under the Vienna Convention's rules on interpretation. The Commission has addressed one aspect of the role of practice other than by parties of the treaty, for the purpose of interpretation, when it provisionally adopted draft conclusion 5 on the attribution of subsequent practice as follows:

> **Draft conclusion 5**
>
> Attribution of subsequent practice
>
> 1. Subsequent practice under articles 31 and 32 may consist of any conduct in the application of a treaty which is attributable to a party to the treaty under international law.
>
> 2. Other conduct, including by non-State actors, does not constitute subsequent practice under articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty.

76. Draft conclusion 5 does not imply that the practice of organs of international organizations, as such, cannot be subsequent practice under articles 31 and 32. In its commentary to draft conclusion 5 the Commission has explained that:

> Decisions, resolutions and other practice by international organizations can be relevant for the interpretation of treaties in their own right. This is recognized, for example, in article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations which mentions the "established practice of the organization" as one form of the "rules of the organization". Draft conclusion 5 only concerns the question whether the practice of international organizations may be indicative of relevant practice by States parties to a treaty.[108]

77. It must be noted, however, that the practice of parties to a treaty and that of organs of an international organization may have a different weight for the purpose of the interpretation of a treaty which is the constituent instrument of an international organization. On the one hand, as the Commission has noted in its commentary to article 2 (j) of the Vienna Convention on the Law of Treaties between States and International Organizations and between International Organizations, the weight of a particular practice of organs may depend on the particular rules and characteristics of the respective organization, as expressed in its constituent instrument:

> It is true that most international organizations have, after a number of years, a body of practice which forms an integral part of their rules. However, the reference in question is in no way intended to suggest that practice has the

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[106] See Draft Conclusion 3, *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 10* (A/68/10), Chapter IV, pp. 12 and 24-30.

[107] Dörr, *supra* note 17, p. 537, para. 31; Schmalenbach, *supra* note 24, p. 92, para. 7.

[108] *Supra* note 3, p. 45, para. 14.

same standing in all organizations; on the contrary, each organization has its own characteristics in that respect.[109]

78. On the other hand, international courts and tribunals have on numerous occasions — appropriately — conceived the practice of the organs of the organization and that of the member States as being inter-related and as constituting a whole ("general practice of the Organization")[110] for the purpose of interpretation. From that perspective it is reasonable to consider "that relevant practice will usually be that of those on whom the obligation of performance falls"[111] which means that "where States by treaty entrust the performance of activities to an organization, how those activities are conducted can constitute practice under the treaty; but whether such agreement establishes agreement of the parties regarding the treaty's interpretation may require account to be taken of further factors."[112]

79. Accordingly, by referring to acts of international organizations which were adopted against the opposition of certain member States[113] the International Court of Justice has recognized that such acts may constitute subsequent practice for the purpose of interpretation generally, but not as a practice establishing an agreement between the parties and thus as an authentic means of interpretation.[114] In contrast, for the Court, a "general practice of the organization" seems to carry more weight as a means of interpretation than an "established practice" of an organ thereof. This is because an established practice of an organ which is accepted by the whole membership amounts to a subsequent practice of the parties under article 31 (3) (b). This reflects the necessary interplay between the organs of the organization and the conduct of their member States for a general practice of the organization to arise.

80. "General acceptance" requires "at a minimum" acquiescence.[115] In the *Wall* opinion, the Court relied on the practice of the organization ("practice of the United Nations"), in order to determine that the interpretation of article 12 of the Charter has evolved over time through the subsequent conduct of the General Assembly and the Security Council.[116] When speaking in this context of the "accepted practice of the General Assembly",[117] the Court implicitly affirmed that acquiescence on behalf of the member States regarding the practice followed by the organization in the application of the treaty is a sufficient requirement for establishing the agreement regarding the interpretation of the relevant treaty provision.

81. Similarly, the "established practice of the organization" is a means for the interpretation of constituent instruments of international organizations. Article 2 (1) (j)

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[109] *Supra* note 71, p. 21.

[110] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16, at p. 22.

[111] Gardiner, *supra* note 13, p. 246.

[112] Gardiner, *supra* note 13, p. 246.

[113] The Court cited G.A. Res. 1600 (XV), U.N. Doc. A/RES/1600 (Apr. 15, 1961) (adopted with 60 votes in favour, 16 votes against, and 23 abstentions); G.A. Res. 1913 (XVIII), U.N. Doc. A/RES/1913 (Dec. 13, 1963) (adopted by 91 affirmative votes over 2 negative votes).

[114] Gardiner, *supra* note 13, p. 247.

[115] See J. Arato, "Treaty Interpretation and Constitutional Transformation", *Yale Journal of International Law*, vol. 38 (2013), p. 289, at p. 322.

[116] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 149.

[117] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, p. 136, at p. 150.

of the Vienna Convention of 1986[118] and article 2 (b) of the Draft Articles on the Responsibility of International Organizations[119] even list the "established practice of the organization" as a "rule of the organization". This designation does not, however, exclude that such practice also serves as a means of interpretation for the constituent instrument. The Commission noted in its commentary to draft article 2 (1) (j) of what became the Vienna Convention of 1986 that:

> ... the reference in question is in no way intended to suggest that practice has the same standing in all organizations; on the contrary, each organization has its own characteristics in that respect. Similarly, by referring to "established" practice, the Commission only seeks to rule out uncertain or disputed practice; it is not its wish to freeze practice at a particular moment in an organization's history.[120]

82. The Commission thereby recognized the "established practice of the organization" at least as a supplementary element of the law of an international organization. It is a source of some controversy which specific legal effects such practice may produce in different organizations and whether such effects should be explained more in terms of traditional sources of international law (treaty or custom) or of institutional law.[121] But even it is difficult to make general statements, it is clear that "established practice of the organization" encompasses a qualified form of practice by organs,[122] one which has generally been accepted by the members of the organization, albeit sometimes tacitly.[123] Such practice can hardly be distinguished from the "general practice of the organization", a form of action which the International Court of Justice has applied as a means of interpretation.[124] Such practice is therefore a means of interpretation of the

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[118] Doc. A/CONF.129/15.

[119] *International Law Commission, Report of the Sixty-third session (2011), Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 10* (A/66/10), Chapter V, p. 52.

[120] *International Law Commission, Report of the Thirty-fourth session (1982), Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10* (A/37/10), Commentary to Art. 2 (1) (j), p. 21, para. 25; this does not exclude that practice exists within an organization which is not "established", but which is nevertheless important for the functioning of the organization.

[121] Higgins, *supra* note 76, at p. 121 ("aspects of treaty interpretation and customary practice in this field merge very closely"); Peters, *supra* note 33, at p. 631 ("should be considered a kind of customary international law of the organization"); it is not persuasive to limit the "established practice of the organization" to so-called internal rules since, according to the Commission, "there would have been problems in referring to the "internal" law of an organization, for while it has an internal aspect, this law also has in other respects an international aspect", *International Law Commission, Report of the Thirty-fourth session (1982), Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 10* (A/37/10), Commentary to Art. 2 (1) (j), p. 21, para. 25; Schermers and Blokker, *supra* note 94, at p. 766; but see C. Ahlborn, The Rules of International Organizations and the Law of International Responsibility, International Organizations Law Review 8 (2011) 397, at. pp. 424-428.

[122] Blokker, Beyond Dili, *supra* note 72, p. 312.

[123] Lauterpacht, *supra* note 72, at p. 464 ("consent of the general body of membership"); Higgins, supra note 76, p. 121 ("[t]he degree of length and acquiescence need here perhaps to be less marked than elsewhere, because the U.N. organs undoubtedly have initial authority to make such decisions [regarding their own jurisdiction and competence]"); Peters, *supra* note 33, pp. 633-641.

[124] Arato, *supra* note 115, p. 322.

constituent instrument of an international organization[125] which shall be taken into account as it is based on the agreement of the membership or follows from the institutional character of the organization. It is possible that the "established practice of the organization" produces further legal effects but such effects are uncertain and are not part of the present topic.

7. Article 5 as reflection of customary law

83. Commentators have maintained that article 5 of the Vienna Convention on the Law of Treaties reflects customary law.[126] This assessment is based on certain statements by delegates regarding draft article 4 (now article 5) at the United Nations Conference on the Law of Treaties in Vienna (1968-1969). In particular, reference is made to the statement of the delegate of Argentina, Mr. Ruda, who expressed the view that:

> the debate had shown that the rule laid down in article 4 was one of *lex lata*, codifying existing rules of customary law. The law established on a customary basis between States, added to long practice, resulted in rules differing from those of general international law existing in treaties. In his delegation's opinion, article 4 only reflected the current situation, and introduced no innovation.[127]

84. However, clear support for this proposition has remained scarce.[128] Moreover, the debates on draft article 4 at the Vienna Conference reflected the contentious nature of this rule at that time, with some delegations suggesting that the text "introduced a danger of confusion and obscurity into a particularly difficult subject",[129] and others asking for its deletion, although for different reasons.[130] So far, the International Court of Justice has not addressed the question whether article 5 of the Convention reflects customary international law.

85. For the purposes of the present topic, it is, however, not necessary to make a precise determination regarding the customary status of article 5. It suffices to say that it has been generally recognized that the rules of the Vienna Convention regarding treaty interpretation are applicable to constituent instruments of international organizations, but always "without prejudice to any relevant rules of the organization". The rule which is formulated in article 5 is sufficiently flexible to

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[125] Written Statement of the United Kingdom on the Report of the Commission 2009, 16th meeting of the Sixth Committee of the General Assembly during its 64th session, 27 October 2009, pp. 4-5; Schermers and Blokker, *supra* note 94, para. 1347; S. Rosenne, Developments in the Law of Treaties 1945-1986 (1989), p. 241; S. Engel, "Living" International Constitutions and the World Court, 16 (1967) ICLQ p. 865, at p. 894; Bühler, *supra* note 83, p. 292; Alvarez, *supra* note 16 , p. 90; Ahlborn, *supra* note 121, p. 425.

[126] M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Leiden/Boston, Martinus Nijhoff Publishers, 2009), p. 120.

[127] Vienna Conference, *Official Records of the Conference, First Session* (A/CONF.39/11), p. 52, para. 73 (Argentina).

[128] See the statements of the representatives of Brazil (Vienna Conference (Brazil), *Official Records of the Conference, First Session* (A/CONF.39/11), p. 56, para. 30), and of the representative of Council of Europe (observer) (Vienna Conference (Council of Europe), *Official Records of the Conference, First Session* (A/CONF.39/11), p. 47, para. 13).

[129] Vienna Conference, *Official Records of the Conference, First Session* (A/CONF.39/11), p. 44, para. 25 (Spain).

[130] See *Official Records of the Conference, First Session* (A/CONF.39/11), p. 43, paras. 15, 18 and 21 (United States) and p. 45, paras. 33 and 36 (Sweden).

accommodate all conceivable cases, including cases in which the organs of an international organization declare, as the Court of Justice of the European Union has done, that the organization concerned does not consider "practice" by either the States parties or the organs to be relevant for the interpretation of the founding treaties. If it is understood in this broad and flexible sense it is clear that article 5 does reflect customary international law.

IV. Draft conclusion 11

86. The preceding considerations permit to propose the following draft conclusion:

Draft conclusion 11
Constituent instruments of international organizations

(1) Articles 31 and 32 apply to a treaty which is the constituent instrument of an international organization without prejudice to any relevant rules of the organization. Accordingly, subsequent agreements and subsequent practice under article 31, paragraph (3) (a) and (b) are, and other subsequent practice under article 32 may be, means of interpretation for such treaties.

(2) The conduct of an organ of an international organization in the application of the constituent instrument of the organization may give rise to or articulate a subsequent agreement or subsequent practice of the parties under article 31, paragraph (3) (a) and (b) or to other subsequent practice under article 32.

(3) The conduct of an organ of an international organization in the application of the constituent instrument of the organization may itself constitute a relevant practice for the purpose of the interpretation of such a treaty.

(4) The established practice of an international organization shall be taken into account in the interpretation of the constituent instrument of the international organization.